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Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Energy Compression Research Corporation--  
Reconsideration

**File:** B-243650.3

**Date:** May 11, 1992

King Golden, Esq., for the protester,  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Request to modify earlier decision sustaining protest and  
finding protester entitled to proposal preparation and bid  
protest costs to recommend a directed award to protester is  
denied where record shows that protester's proposal was  
technically unacceptable and its proposed costs exceeded the  
amount of available funding.

### DECISION

Energy Compression Research Corporation (ECR) requests  
reconsideration of our decision, Energy Compression Research  
Corp., B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466, sustaining  
its protest against the award of a contract to Kaman  
Sciences Corporation under Program Research and Development  
Announcement (PRDA) No. 91-05, issued by the Department of  
the Air Force for the design and development of an Ultra  
Wide Band Microwave Source.

We deny the request for reconsideration.

The sole basis for sustaining ECR's protest was that the  
agency conducted a potentially unequal competition by per-  
mitting the awardee to team with Sandia National  
Laboratories--a federally Funded Research and Development  
Center (FFRDC) sponsored by the Department of Energy (DOE)--  
in contravention of Federal Acquisition Regulation (FAR)  
§ 35.017(c)(4). The regulation specifically precludes  
FFRDCs from competing for government contracts with the  
private sector. ECR's other objections to the conduct of  
the procurement--including that the agency improperly  
evaluated Kaman's technical proposal and manifested bias  
against the protester in the evaluation of its proposal--  
were specifically found in our decision to be without merit.

Because a statutorily-imposed stay of contract performance under 31 U.S.C. § 3553(d)(1) (1988) did not apply here, Kaman had completed approximately one-half of the contract by the time our decision was issued. We therefore found it impractical to recommend termination of the contract; we found the protester entitled to recover its proposal preparation and bid protest costs.

ECR objects to this remedy and, in its request for reconsideration, seeks a recommendation of contract termination and a directed award to it. ECR bases its position on two principal arguments: (1) that the Air Force deliberately delayed in notifying the protester of the award to Kaman so as to effectively preclude a statutory suspension of contract performance with the result that the firm was denied the remedy it seeks--a directed award; and (2) the awardee's description of the work being performed under the contract reveals that the firm is, in fact, building a different microwave device from the one it proposed.

#### NOTICE OF AWARD

The Air Force awarded a contract to Kaman on March 27, 1991, but did not telephonically notify ECR of the award until April 5--on the ninth calendar day following award. A written notice was issued on April 18 and received on April 22. Based on the April 5 notification, ECR filed its protest on April 15--a timely protest under our Regulations, but outside the 10-calendar day period following award which would operate to effectuate a statutory suspension of contract performance. Bid Protest Regulations, 4 C.F.R. § 21.4 (1992). ECR argues that this constituted a deliberate attempt by the agency to deny the firm an opportunity to obtain a meaningful remedy.

Effective implementation of 31 U.S.C. § 3553(d)(1)--which mandates a stay of contract performance when an agency has been notified of a protest to this Office within 10 calendar days of the date of award--is dependent on prompt notification to unsuccessful offerors. The Competition in Contracting Act requires the Air Force to "promptly" notify unsuccessful offerors when their proposals have been rejected. See 10 U.S.C. § 2305(b)(4)(B) (Supp. II 1990); FAR § 15.1001(a).

The agency has offered no explanation as to why it took 9 days to telephonically notify ECR and an additional 13 days to issue a written notice which was not received for 4 more days. On the other hand, even if there had been no delay in notifying ECR, we would not have recommended a directed award to the protester because the evaluation record shows that ECR's proposal was found to be technically unacceptable and not susceptible to being made acceptable

without major revisions. Moreover, unlike either of the other offerors, ECR proposed costs (\$6,699,376) which exceeded the total amount of funds available for the project solicited under the PRDA.

We thus find no basis in the protester's first argument to modify our earlier decision as requested.

#### KAMAN'S CONTRACT PERFORMANCE

Referencing two scientific publications which ECR states were presented by representatives of the awardee in January 1992 to describe their work under the contract, the protester asserts that Kaman is not performing in accordance with the proposal described during our consideration of the protest.

According to ECR, Kaman is now basing the laser system for its microwave device on the use of a diode laser-pumped laser similar to the conventional design proposed by ECR instead of a new and unique laser system described by Kaman in its interested party comments filed with this Office. In addition, ECR submits that Kaman is now using a 30-switch design instead of the single-switch design which had been highly regarded by the evaluators and which formed a basis for distinguishing between the awardee's design and Kaman's 216-switch design. (ECR's design had been faulted for being too complex.) ECR argues that these newly-discovered circumstances show that the Air Force and Kaman deliberately misled this Office about the true nature of the winning proposal and that they support its request for a directed award.

We have examined the technical proposals submitted by Kaman and ECR and find that each firm proposed the use of "diode laser-pumped Nd:YAG" laser systems. Nothing in the evaluation record indicates that the Air Force believed otherwise, and we note that the evaluations found risks to be inherent in each offeror's approach; however, the record also shows that the agency was particularly impressed with Kaman's designated supplier of commercial components for its proposed laser system because that supplier had a reputation for providing very reliable parts. Thus, it appears that Kaman's proposal was evaluated on the basis it was submitted

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The PRDA stated that the "type of contract contemplated is cost-plus-fixed-fee estimated at approximately \$6 million over an 18-month period." The agency report in the earlier protest matter states that the \$6 million was the "published budget" for the project and that less than that amount was actually available to fund the contract after administrative costs were subtracted.

and that the laser system it is providing conforms to the description contained in the proposal. We therefore have no basis for concluding that we were misled by the Air Force concerning the true nature of the awardee's proposed laser system.

The record also shows that the Air Force did not mislead us about the nature of Kaman's proposed approach to switching devices. Kaman's proposal details a single-switch approach and it is clear that the agency's evaluation was based on a single-switch approach. The fact that this approach may have changed during contract performance does not itself provide a basis for modifying our earlier decision in the absence of a showing that the underlying contract was awarded with an intent to later modify it or that the changes represented by the new approach are beyond the scope of the original contract--in the absence of either event, whether a contractor performs in accordance with its contract is a matter of contract administration which we will not review. See Horizon Trading Co., Inc.--Recon., B-231177.3, Nov. 21, 1988, 88-2 CPD ¶ 493.

There is no indication in the record that the Air Force awarded Kaman a contract which it later intended to modify. The record shows that the awardee proposed a single-switch solution to the engineering problems posed in the PRDA and that its proposal was evaluated on that basis. Also, in view of the broad language of the PRDA contemplating the use of multiple switches as an acceptable engineering approach, we have no basis for concluding that a change to using multiple switches would necessarily exceed the scope of Kaman's original contract. Finally, even if such a change is properly viewed as exceeding the scope of the contract, the directed award sought by ECR remains inappropriate because, as discussed above, the protester submitted a technically unacceptable proposal which was prohibitively expensive.

The request for reconsideration is denied.

  
James F. Hinchman  
General Counsel